(9)

No. 06-457

FILED

AUG 2 3 2007

OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE

Supreme Court of the United States

G. STEVEN ROWE, In His Official Capacity As Attorney General of the State of Maine,
Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

STEVEN H. GOLDBLATT
CECILY E. BASKIR
RICHARD H. FRANKEL
GEORGETOWN UNIVERSITY LAW CENTER
APPELLATE LITIGATION PROGRAM
111 F Street, N.W.
Washington, D.C. 20001
(202) 662-9555

RICHARD RUDA *
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether the Federal Aviation Administration Authorization Act of 1994 preempts the Maine Tobacco Delivery Law, which prohibits the delivery to Maine's children of cigarettes and other tobacco products they have illegally purchased over the internet or by other electronic means.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE STRONG PRESUMPTION AGAINST PREEMPTION OF STATE HEALTH LAWS IS DEEPLY ROOTED IN THIS COURT'S RECOGNITION OF THE STATES' PRIMARY RESPONSIBILITY TO PROTECT THEIR CITIZENS' HEALTH	4
II. IN ENACTING THE FAAAA, CONGRESS DID NOT CLEARLY AND MANIFESTLY INTEND TO PREEMPT MAINE'S TOBACCO DELIVERY LAW	10
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)	12, 14
Austin v. Tennessee, 179 U.S. 343 (1900)	7, 7-8, 8
Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005)	9
California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997)	*passim*
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)	9, 10
Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424 (2002)	13
De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806 (1997)	9, 11
Egelhoff v. Egelhoff, 532 U.S. 141 (2001)	11, 12
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)	15, 16
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)	1, 6
Gonzales v. Oregon, 546 U.S. 243 (2006)	9
Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994)	9
Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707 (1985)	5, 9
Holden v. Hardy, 169 U.S. 366 (1898)	7
House v. Mays, 219 U.S. 270 (1911)	5
Jacobson v. Massachusetts, 197 U.S. 11 (1905)	2, 8
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	10
Lorillard v. Tobacco Co. v. Reilly, 533 U.S. 525 (2001)	15, 16
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)	4-5, 9, 10, 12
Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)	5

TABLE OF AUTHORITIES—Continued

Page

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 11, 11-12
New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552 (1905) 8, 8-9
N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) ..... *passim*
Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190 (1983) 16
Pharmaceutical Research & Mfrs. of America v. Walsh, 538 U.S. 644 (2003) 16
Railroad Co. v. Husen, 95 U.S. 465 (1877) 6, 6-7
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 5, 10
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) .. 11, 13
United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786 (2007) 9
Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001) 16-17
Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 9-10

Statutes

Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub.L. No. 102-321, § 202, 106 Stat. 394 (1992) 15
Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601, 108 Stat. 1569 (1994) ..... *passim*
22 Me. Rev. Stat. Ann. § 1555-C 17
22 Me. Rev. Stat. Ann. § 1555-D 17

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 300x-26	15
49 U.S.C. § 14501(c)(1)	10
49 U.S.C. § 14501(c)(2)	14
49 U.S.C. § 41713(b)(4)(A)	10
49 U.S.C. § 41713(b)(4)(B)(i)	14
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978)	11
49 U.S.C. App. § 1305(a)(1)	12
Other Authorities	
The Federalist Number 17 (Hamilton) (C. Rossiter ed. 1961)	6
H.R. Conf. Rep. 103-677 (1994)	13, 14
Oxford Universal Dictionary on Historical Principles (3d rev. ed. Oxford: Clarendon Press, 1955)	6
Webster's Third New International Dictionary (1976)	6

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a strong interest in this Court's preemption jurisprudence.[1] This case turns on the application of one of the Court's most venerable preemption doctrines: the strong presumption against preemption of state health laws, which are displaced by federal law only if "that was the clear and manifest purpose of Congress." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995). The court of appeals cavalierly dismissed this presumption in a footnote and disregarded the Court's many cases, starting with *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), which have respected the States' primary responsibility to protect their citizens' health. Because of the States' central role in preventing children from buying cigarettes illegally, and the importance of correcting the erroneous application of preemption principles by the court below, *amici* respectfully submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

1. Two centuries of the States' protection of their citizens' health -- a history that has long been recognized and respected by this Court -- militate against a finding of preemption in this case. This judicial deference was expressed by the Court at least as early as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824), in which Chief Justice Marshall wrote that "health laws of every description" are part of "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the [federal]

---

[1] The parties have consented to the filing of this brief, which was not authored in whole or in part by counsel for any party. No person or entity other than *amici* and their members made a monetary contribution to the preparation or submission of this brief.

government." Since *Gibbons*, this Court has repeatedly reaffirmed the States' right and responsibility to enact public health laws. For example, in *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905), Justice Harlan wrote for the Court that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."

An ineluctable consequence of the reservation to the States of the right and duty to protect public health is the strong presumption against preemption of state health laws. The Court has "never lightly assumed that Congress has derogated state regulation, but instead h[as] addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

The presumption is particularly powerful in areas of governance reserved to the States; in such cases the Court has "worked on the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (citation and internal quotations omitted). Even in cases where it is clear that Congress intended a statute to have some preemptive effect, the presumption plays an important role in limiting preemption to the scope clearly delineated by Congress.

2. In this case the record does not manifest *any* congressional intent to preempt state laws, like Maine's, that prevent children from illegally purchasing cigarettes over the internet. On the contrary, all indicia of congressional intent reinforce the conclusion that Congress did not intend the FAAAA to preempt Maine's Tobacco Delivery Law.

The reference to laws "related to a price, route, or service" in § 601, the FAAAA's express preemption provision, is

plainly inadequate to determine whether Maine's law falls within the scope of Congress's preemptive intent. The language "related to" in § 601 is inherently unclear. Because the statute's language is not dispositive, the Court must look beyond it to the FAAAA's objectives, structure, and purpose, and the impact of Maine's law on the federal regulatory scheme.

The legislative history of the FAAAA establishes that Congress's primary concern in § 601 was to eliminate state economic regulation of air and motor carriers, including back-door attempts by States at *de facto* economic regulation, such as state laws designed directly to influence carrier prices or create barriers to entry. But Congress did not intend to preempt state regulation that did not implicate such concerns. For example, the FAAAA expressly saves state laws that regulate safety and highway routes based on vehicle size or the hazardous nature of cargo, as well as state insurance requirements. Moreover, the FAAAA's list of non-preempted areas is not all-inclusive but merely specifies some of the matters which are not "prices, rates, or services" where state regulation is subject to preemption.

Another important component of preemption analysis is an examination of evidence of Congress's intent to preserve or rely upon the complementary exercise of state authority notwithstanding the creation of a federal regulatory structure. Preemption is less likely in areas in which Congress has specifically encouraged the States to act. The federal legislative and regulatory framework concerning cigarettes and other tobacco products strongly indicates that Congress did not intend to preempt Maine's Tobacco Delivery Law. Congress has specifically given the States the responsibility to regulate the retail sale of tobacco products to children and precluded federal agencies from engaging in this type of regulation.

To be effective, state laws designed to prevent children from purchasing cigarettes online or by telephone will have

some effect on motor carriers that deliver tobacco products. Given tobacco's well-known toxicity and the States' role in protecting public health, if Congress had intended to prevent States from interdicting internet sales of tobacco to children simply because motor carriers are involved, it surely would have made its intention to do so clear. It defies common sense even to suggest -- much less to rule like the court below -- that Congress considered a minimal effect on motor carriers more important than protecting the health of children who illegally purchase cigarettes over the internet.

ARGUMENT

This case turns on the proper application of the strong presumption against preemption of state health statutes, which are displaced only if "that was the clear and manifest purpose of Congress." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (citation omitted). The court of appeals brushed aside this historic presumption, Pet. App. 14 n. 10, and ignored persuasive indicia that Congress did not intend the Federal Aviation Administration Authorization Act of 1994 to preempt Maine's Tobacco Delivery Law. The potentially lethal consequences of this erroneous ruling for children in Maine and many other States warrant reversal of the judgment below.

I. THE STRONG PRESUMPTION AGAINST PREEMPTION OF STATE HEALTH LAWS IS DEEPLY ROOTED IN THIS COURT'S RECOGNITION OF THE STATES' PRIMARY REPONSIBILITY TO PROTECT THEIR CITIZENS' HEALTH

The strong presumption against preemption of state health laws reflects a deference that has existed since the founding of the nation. "Throughout our history the several States have exercised their police powers to protect the health and

safety of their citizens." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). "Because these are 'primarily and historically, . . . matter[s] of local concern,' *id.* (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)), the 'States have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Id.* (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, (1985)).

The powers of the States are, of course, limited by the Constitution, and Congress may, in the exercise of its enumerated powers, supersede state laws. *See Hillsborough County*, 471 U.S. at 712-13. Yet "despite the variety of . . . opportunities for federal preeminence," this Court has "never assumed lightly that Congress has derogated state regulation, but instead h[as] addressed claims of pre-emption with the starting presumption that Congress does *not* intend to supplant state law." *Travelers*, 514 U.S. at 654 (emphasis added). Particularly in cases that implicate the States' right and duty to protect health and "where federal law is said to bar state action," the Court "work[s] on the 'assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Deference to a State's exercise of its police powers to protect public health is a bedrock federalism principle repeatedly recognized and applied by the Court. The police power was "not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government." *House v. Mays*, 219 U.S. 270, 282 (1911). This deference is evidenced in the Court's cases rejecting challenges to the validity of public health laws under the Supremacy Clause, the Commerce Clause, and the Fourteenth Amendment.

Express recognition of the reservation of health regulation to the States came at least as early as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, Chief Justice Marshall stated for the Court that "health laws of every description" are part of "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the [federal] government." *Id.* at 203. "No direct general power over these objects is granted to Congress," the Chief Justice wrote, "and, consequently, they remain subject to State legislation." *Id.*[2]

In the nearly 200 years since *Gibbons*, States have enacted countless laws to protect the public health. This Court has repeatedly affirmed their right to use police powers in this manner, absent clear and manifest evidence that the particular state action has been preempted by Congress or that it violates a specific constitutional guarantee.

In 1877, the Court "unhesitatingly admit[ted] that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders" that are "necessary for its self-protection." *Railroad Co. v. Husen*, 95 U.S. 465, 472 (1877). Although *Husen* invalidated a Missouri statute that prohibited shipments of all "Texas, Mexican, or Indian cattle" through the State, *id.* at 469, it would, said the unanimous Court, be well within the police power of the State to exclude "animals having contagious or infectious diseases." *Id.* at 471. Such a valid "exertion[] of power [is] in immediate connection with the protection of

---

[2] *See also The Federalist Number 17* (Hamilton) 118 (C. Rossiter ed. 1961) (noting reservation to the States of the "domestic police of a State"). "Police" as used by Hamilton undoubtedly referred to "[t]he regulation, discipline, and control of a community; civil administration; enforcement of law." *Oxford Universal Dictionary on Historical Principles* 1536 (3d rev. ed. Oxford: Clarendon Press, 1955); *accord Webster's Third New International Dictionary* 1754 (1976).

persons and property against noxious acts of other persons. . . . They are self-defensive." *Id.* at 471.

Holden v. Hardy, 169 U.S. 366 (1898), upheld against a Fourteenth Amendment challenge a state statute whose design and purpose was to protect citizens' health. In 1896 the Utah legislature limited the hours of workers in coal mines or smelters to eight per day because "[t]hese employments, when too long pursued, the legislature has judged to be detrimental to the health of the employes." *Id.* at 395. In upholding this statute, the Court explained the foundation of the State's police power to protect the health of its citizens:

> It is as much for the interest of the State that the public health should be preserved as that life should be made secure. With this end in view quarantine laws have been enacted in most if not all of the States; insane asylums, public hospitals and institutions for the care and education of the blind established, and special measures taken for the exclusion of infected cattle, rags and decayed fruit.

Id. at 395. Given the long tradition of the States' right and duty to protect public health and the variety of contexts in which it had been exercised, the *Holden* Court concluded that "[t]he whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer." *Id.* at 397 (internal quotation omitted).

Two years later, the Court again showed deference to the state police power. In *Austin v. Tennessee*, 179 U.S. 343 (1900), it acknowledged Tennessee's right to prohibit in-state sales of cigarettes "for the protection of public health." *Id.* at 349. Regarding cigarettes, the Court observed, "we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely . . . provided no discrimination be used as against such as are imported from

other States, and there be no reason to doubt that the act in question is designed for the protection of the public health." *Id.* at 348-49. The Court summarized its respect for state health measures as follows:

> We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that, if the action of the state legislature were a *bona fide* exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce.

Id. at 349.

The States' right to protect their citizens' health also was the basis for the Court's rejection of a Fourteenth Amendment challenge to a state compulsory vaccination law. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), Justice Harlan wrote for the Court that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. Indeed, "[a]ccording to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id.* at 25.

New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552 (1905), upheld the validity of licensing of persons engaged in the sale or delivery of milk. The Court reaffirmed "[t]he right of the State to regulate certain occupations which may become unsafe or dangerous when unrestrained, in the exercise of the police power, with a view to protect the public health and welfare. . . ." *Id.* at 558. *Lieberman* stands for "the proposition that the State has a right, by reasonable regula-

tion, to protect the public health and safety." *Id.* (collecting cases).

To this day, the Court continues to respect the role of state power in protecting the health and safety of their citizens. Last Term, in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S.Ct. 1786 (2007), the Court stressed that state and local governments are "vested with the *responsibility* of protecting the health, safety, and welfare of [their] citizens," *id.* at 1795 (emphasis added), in the exercise of which they have "great latitude," *id.* (citing *Metro. Life Ins. Co.*, 471 U.S. at 756), and with which the federal courts "should be particularly hesitant to interfere," *id.* at 1796. *See also Gonzales v. Oregon*, 546 U.S. 243, 271 (2006) ("regulation of health and safety is 'primarily, and historically, a matter of local concern'") (citation omitted); *Medtronic*, 518 U.S. at 475; *Hillsborough County*, 471 U.S. at 718-19 (1985).

The presumption against preemption is an ineluctable consequence of the Court's historic deference to the States' exercise of the police power to protect public health. It ensures that state health laws will be protected from preemption. Only a showing of a clear and manifest purpose of Congress to preempt state action will suffice to "overcome the presumption that state and local regulation of health and safety matters can constitutionally co-exist with federal regulation." *Hillsborough County*, 471 U.S. at 716.

The Court has repeatedly invoked the presumption, both as to the *existence* of preemption and as to its *scope*, even in cases where it is clear that Congress intended a statute to have some preemptive effect. *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 450-52 (2005); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 n.8 (1997); *Medtronic*, 518 U.S. at 485; *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); *Wisconsin Public Intervenor v.*

Mortier, 501 U.S. 597, 604-05, 611 (1991); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice*, 331 U.S. at 230. Here the relevant indicia do not manifest *any* evidence of congressional intent to preempt state laws to prevent children from buying cigarettes over the internet. Instead, they reinforce the conclusion that Congress intended to leave this vital sphere of public health law to the States.

II. IN ENACTING THE FAAAA, CONGRESS DID NOT CLEARLY AND MANIFESTLY INTEND TO PREEMPT MAINE'S TOBACCO DELIVERY LAW

While § 601 of the FAAAA precludes States from economically regulating a motor carrier's prices, routes, and services, it falls far short of being the clear and manifest statement of congressional intent required to invalidate Maine's Tobacco Delivery Law. Moreover, the legislative history of the FAAAA and other federal legislation directing the States to regulate the sale of tobacco products reinforce the conclusion that Congress had no intention to preempt Maine's law merely because it may, at most, place minimal obligations on motor carriers.

Turning first to the statute itself, the text of the FAAAA's preemption provision must be construed "in light of the presumption against the pre-emption of state police power regulations" discussed above. *Cipollone*, 505 U.S. at 518; *see also Medtronic*, 518 U.S. at 485. While Congress's express intent in the FAAAA was to preempt some state laws, § 601's general reference to state laws "related to a price, route, or service of" a motor or air carrier, 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), is plainly inadequate to determine whether Maine's Tobacco Delivery Law falls within the scope of Congress's preemptive intent. As this Court has repeatedly held, an express preemption clause that uses the language "relate to" to indicate its scope is unclear because "[i]f 'relate

to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere." *Travelers*, 514 U.S. at 655 (internal citations omitted).

In *Travelers*, the Court ruled that the indeterminate phrase "relate to" does not alter the Court's strong presumption against preemption of state health laws. *See* 514 U.S. at 655; *De Buono*, 520 U.S. at 813 (discussing the *Travelers* decision). *Travelers* held that an open-ended construction of "relate to" provides no guidance at all because "that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." 514 U.S. at 655; *see also Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997); *id.* at 335 (Scalia, J., concurring) ("applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else").[3]

---

[3] The court of appeals believed its decision was dictated by *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), Pet. App. at 16-17, but this reliance was misplaced. *Morales* recognized limits to the Airline Deregulation Act of 1978's preemptive scope, Pub. L. No. 95-504, 92 Stat. 1705 (1978) ("ADA"), noting that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner for the federal statute to have preemptive effect." *Morales*, 504 U.S. at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)) (internal citations omitted). Indeed, the *Morales* Court expressly recognized that "[i]n this case, as in *Shaw*, '[t]he present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.'" *Id.* (quoting *Shaw*, 463 U.S. at 100 n.21). The facts presented in *Morales* clearly justified the Court's reluctance to define the outer limits of preemption. *Morales* dealt with state efforts to regulate airline price advertising, a domain expressly preempted by the

Thus, in this case as in *Travelers* and *Dillingham*, the language of the statute is not dispositive. Therefore the Court "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the [federal] statute as a guide to the scope of the state law that Congress understood would survive" preemption. *Travelers*, 514 U.S. at 656. The Court looks to "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic*, 518 U.S. at 486 (internal citation omitted). The Court also looks to other indicia of congressional intent, such as the federal legislative and regulatory scheme in the area of the challenged state action. *See Dillingham*, 519 U.S. at 319-21, 331 n.7; *Travelers*, 514 U.S. at 665-67; *Wolens*, 513 U.S. at 228-32.

The Court also must examine "the nature of the effect of the state law" on the prices, routes, and services of air and motor carriers to determine congressional intent. *See Dillingham*, 519 U.S. at 325; *see also Egelhoff*, 532 U.S. at 147. As this Court has repeatedly observed, the effects of some state laws on activities subject to federal regulation—in this case motor carriers' prices, routes, or services—are simply "too tenuous, remote, or peripheral . . . " to support the conclusion that Congress intended to preempt the state law. *Morales v. Trans*

ADA: "air carriers' 'rates, routes, or services." 504 U.S. at 378-79 (quoting 49 U.S.C. App. § 1305(a)(1)). Although protecting consumers from misleading advertising is an exercise of the police power, the state action preempted in *Morales* involved (1) attempts to regulate airline advertising that would have a significant impact on fares, *see* 504 U.S. at 388-90; *see also American Airlines, Inc. v. Wolens*, 513 U.S 219, 224 (1995), and (2) regulation of practices squarely within the regulatory sphere of the U.S. Department of Transportation. *See Morales*, 504 U.S. at 390-91; *Wolens*, 513 U.S. at 224. Under those facts, the Court found that state efforts to regulate airline price advertising were preempted.

World Airlines, Inc., 504 U.S. 374, 390 (1992) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)). State action that exerts only an indirect or minimal economic influence on the prices, routes, or services of a carrier without binding the carrier to any particular choice is less likely to fall within the domain that Congress intended to preempt. *See Travelers*, 514 U.S. at 659-62 (indirect, nonbinding economic influence insufficient to trigger preemption); *Dillingham*, 519 U.S. at 332-34 (nonbinding economic incentive that was "substantially similar" to effect in *Travelers* not preempted).

In this case, the legislative history establishes that Congress's primary concern in § 601 was to eliminate state economic regulation of carriers, including back-door attempts by States at *de facto* economic regulation. *See Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002) ("The problem to which the congressional conferees attended [in § 601] was state *economic* regulation.") (internal citation omitted) (emphasis in original). Congress concluded that "[s]tate economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets." H.R. Conf. Rep. 103-677, at 87 (1994). As a result, Congress sought to eliminate "antiquated controls," *id.* at 88, that included state regulation of trucking prices "designed to ensure . . . that [prices] are kept high enough to cover all costs and are not so low as to be 'predatory'. . . [and] filing of tariffs and long intervals for approval to change prices." *Id.* at 87. Other forms of state regulation that Congress sought to preempt were barriers to entry that restricted competition for trucking routes and types of trucking business. *See id.* at 86.

Congress did not intend to preempt state regulation of motor carriers that did not implicate its concerns about economic regulation. *Id.* at 84-85. The FAAAA expressly saves the "safety regulatory authority of a State with respect to motor ve-

hicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, [and] the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." 49 U.S.C. §§ 14501(c)(2), 41713(b)(4)(B)(i). Significantly, Congress emphasized that "[t]his list" of non-preempted areas "is not intended to be all-inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. 103-677, at 84 (also describing the non-preempted state regulatory authority as only "partially identified" in the statute's exceptions provision). The FAAAA and its legislative history thus indicate that Congress did not intend for § 601 to have sweeping preemptive reach into all areas of traditional state authority that tangentially relate to motor carriers; it sought to prevent state economic regulation of carriers' prices, routes, or services.

Another important component of the Court's preemption analysis is an examination of indicia of congressional intent to preserve or rely upon the complementary exercise of state authority, notwithstanding the creation of a federal regulatory structure. *See Dillingham*, 519 U.S. at 319-21, 331 n.7; *Travelers*, 514 U.S. at 665-67; *Wolens*, 513 U.S. at 230-32. Of particular relevance here, the Court is less likely to find clear congressional intent to preempt state law in areas where Congress has specifically encouraged the States to act. *See Dillingham*, 519 U.S. at 331 n.7 (discussing Congress's intent to foster state statutes in the area of apprenticeship programs as support for holding that Congress did not intend to preempt California's prevailing wage law); *Travelers*, 514 U.S. at 665-67 (discussing Congress's intent to encourage state responses to growing health care costs and state experiments with comprehensive hospital reimbursement as support for holding that Congress did not intend to preempt New York hospital surcharge).

Here, the federal legislative and regulatory framework concerning cigarettes and other tobacco products strongly indicates that Congress did not intend to preempt Maine's Tobacco Delivery Law. Indeed, Congress has specifically given the States the responsibility to regulate the retail sale of tobacco products in order to prevent minors from obtaining them. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 552 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155 (2000). The Synar Amendment to the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 394 (1992) (codified at 42 U.S.C. § 300x-26), passed only two years before the FAAAA, *directs* States to prohibit the sale and distribution of tobacco products to minors and to engage in related enforcement efforts. 42 U.S.C. § 300x-26.

Furthermore, as the Court has recognized, Congress "created a distinct scheme to regulate the sale of tobacco products, focused on labeling and advertising." *Brown & Williamson*, 529 U.S. at 156. At the same time, "Congress has persistently acted to preclude a meaningful role for *any* [federal] administrative agency in making policy on the subject of tobacco and health." *Id.* (emphasis in original). By prohibiting federal regulation in this area, Congress necessarily has left the weighty responsibility of preventing illegal sales of cigarettes to children to the States. *See Lorillard*, 533 U.S. at 552 ("Accordingly, the [Federal Cigarette Labeling and Advertising Act] does not pre-empt state laws prohibiting cigarette sales to minors.").

Given a regulatory scheme that makes the States responsible for prohibiting children from purchasing cigarettes, it strains credulity to assert that Congress intended the FAAAA to preempt Maine's Tobacco Delivery Law on the theory that it somehow constitutes state economic regulation of motor carriers. As in *Dillingham*, "Congress' silence on the preemption of state statutes that Congress previously sought to

foster counsels against pre-emption here." 519 U.S. at 331 n.7. Moreover, "[t]o interpret [the FAAAA's] pre-emption provision as broadly as respondents suggest . . . would [leave] States without the authority to do just what Congress was expressly trying to induce them to do" through the Synar Amendment. *Travelers*, 514 U.S. at 667. *See also Pharmaceutical Research & Mfrs. of America v. Walsh*, 538 U.S. 644, 666 (2003) ("The presumption against federal pre-emption of a state statute designed to foster public health has special force when it appears, and the Secretary has not decided to the contrary, that the two governments are pursuing common purposes.") (internal quotations and citations omitted).

It is also reasonable that, to be effective, any state law designed to prevent minors from purchasing tobacco products online or by telephone must have *some* effect on motor carriers that deliver tobacco products. In light of Congress's stated policy of directing States to prohibit sales of cigarettes to children, it is implausible that Congress intended to create a regulatory void in this critical area of public health when it enacted the FAAAA. *Cf. Pacific Gas & Elec. Co. v. State Energy Res. Conser. & Dev. Comm'n*, 461 U.S. 190, 207-08 (1983) ("It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make these judgments."). Given tobacco's well-known toxicity, the States' compelling interest in preventing underage tobacco use, *Lorillard*, 533 U.S. at 564, and the long tradition of States protecting public health, if Congress had intended to *revoke* the States' power to interdict internet tobacco sales to children simply because motor carriers are involved, it would have made its intention clear and manifest in the FAAAA. *See Brown & Williamson*, 529 U.S. at 160 (Congress would not make "a decision of such economic and political significance" about tobacco regulation "in so cryptic a fashion"). *Cf. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457,

468 (2001) (Congress "does not hide . . . elephants in mouseholes").

Furthermore, even assuming the Maine law affects the prices, routes, or services of carriers, it does so in too tenuous, remote, and peripheral a manner to warrant preemption. As petitioner explains, *see* Pet. Br. 7-8, § 1555-C imposes several obligations on tobacco *retailers* to prevent the sale of tobacco products to children, including the use of a delivery service that requires that the purchaser be the addressee, sign for the package, and show valid identification if under 27. *See* 22 Me. Rev. Stat. Ann. § 1555-C. Section 1555-D prohibits any person from knowingly transporting tobacco products from unlicensed retailers, and it deems knowledge that a package contains tobacco if it has been so marked or if the sender is listed by the Attorney General as an unlicensed tobacco retailer. *See* 22 Me. Rev. Stat. Ann. § 1555-D. As petitioner demonstrates in detail, *see* Pet. Br. 12-15, any effect of Maine's Tobacco Delivery Law on the prices, routes, or services of carriers will be at most indirect and *de minimis*.

Given the competing congressional interests involved and the long history of state primacy in protecting public health, it is unfathomable that Congress intended to preempt a vital state exercise of the power to protect children's health because of an at-most tangential effect on carriers' operations. As the Court declared in *Dillingham*, "We could not hold preempted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort." 519 U.S. at 334.

There is no clear and manifest evidence that Congress, when seeking to achieve two goals—directing States to prevent children from buying cigarettes and deregulating the motor carrier industry—considered a minimal impact on motor carriers of greater consequence than protecting the health of the increasing numbers of children who buy cigarettes online.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

STEVEN H. GOLDBLATT
CECILY E. BASKIR
RICHARD H. FRANKEL
GEORGETOWN UNIVERSITY
LAW CENTER
APPELLATE LITIGATION
PROGRAM
111 F Street, N.W.
Washington, D.C. 20001
(202) 662-9555

August 23, 2007

RICHARD RUDA *
STATE AND LOCAL LEGAL
CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

* Counsel of Record